

JOHN T. ALEXANDER

IBLA 94-730

Decided July 17, 2002

Appeal from decision of the Henry Mountain (Utah) Resource Area Manager, Bureau of Land Management, offering a right-of-way and determining annual rental. UTU-68992 and 68993.

Affirmed.

1. Federal Land Policy and Management Act of 1976: Rights-of-Way--
Federal Land Policy and Management Act of 1976: Service Charges--
Rights-of-Way: Act of October 21, 1976 (FLPMA)--Rights-of-Way:
Applications--Rights-of-Way: Federal Land Policy and Management Act
of 1976

Sec. 504 of FLPMA and 43 CFR 2808.1(a) require a right-of-way applicant to reimburse the United States for reasonable administrative and other costs incurred in processing the application and in monitoring construction and operation pursuant to the right-of-way. BLM's decision assessing an application processing fee as "Category II" complies with 43 CFR 2808.2-1(a)(2) and is properly affirmed where the application is one for which (1) data necessary to comply with the National Environmental Policy Act of 1969 are available in BLM's office or from data furnished by the applicant and (2) one field examination is required to verify existing data.

2. Trespass: Generally--Words and Phrases

"Trespass." Departmental regulations define "trespass" generally as "any use, occupancy or development of the public lands or their resources without authorization to do so from the United States where authorization is required, or which exceeds such authorization." 43 CFR 2800.0-5(u). The regulations specifically governing enclosures prohibit "[c]onstructing or maintaining any kind of * * * fences or enclosures on the Federal range * * * without authority of law or a permit."

43 CFR 9239.2-1(c). A BLM decision finding that a fence was being maintained in trespass and ordering the removal of that fence will be affirmed where (1) the fence enclosed approximately 15 acres of Federal lands, effectively adding them to adjacent private lands; (2) the trespasser repeatedly admitted that the fence was being used both to define the boundary of his property and to contain his cattle; and (3) the fence was gated, controlling access to the trespasser's private property. Although the user did not personally construct the fence, he "used" it for a period of 7 or 8 years after acquiring his private lands and "maintained" it by not removing it. There being a trespass, BLM was authorized to require the trespasser to remove (at his own expense) improvements maintained on lands in trespass, even if originally placed there unintentionally or inadvertently.

3. Act of July 26, 1866—Federal Land Policy and Management Act of 1976: Rights-of-Way—Rights-of-Way: Generally—Rights-of-Way: Act of October 21, 1976 (FLPMA)—Rights-of-Way: Federal Land Policy and Management Act of 1976—Rights-of-Way: Revised Statutes Sec. 2477—Words and Phrases:

"Continuous Use." "Public Road." Where a party seeking to continue to use an existing road running across Federally-owned lands as an access road to his privately-owned lands makes no written showing that the road was cognizable under section 8 of R.S. § 2477 and concedes that the road is not a "public road" (a fact inconsistent with the existence of an R.S. § 2477 right-of-way), the Board should not pursue the matter on his behalf and there is no valid reason to remand the matter for consideration of the existence of an R.S. § 2477 right-of-way. "Continuous use," even if established, is insufficient to qualify a road under R.S. § 2477.

4. Federal Land Policy and Management Act of 1976: Rights-of-Way—Rights-of-Way: Generally—Rights-of-Way: Act of October 21, 1976 (FLPMA)—Rights-of-Way: Federal Land Policy and Management Act of 1976

By virtue of 43 CFR 2801.3(e), BLM lacks authority to issue any right-of-way under FLPMA to an applicant until trespass issues concerning the applicant are settled.

APPEARANCES: John T. Alexander, M.D., San Diego, California, pro se.

OPINION BY ADMINISTRATIVE JUDGE HUGHES

On March 31, 1993, the Henry Mountain (Utah) Resource Area Manager, Bureau of Land Management (BLM), issued a letter to Karin Alexander Baxter, care of John T. Alexander, 1/ stating as follows:

A recent examination of the public land located adjacent to your property near Torrey, Utah, indicates that you may be using public land without authorization. It appears that you have fenced approximately 15 acres of public land and are using an access road on the public land without proper authorization. * * * The unauthorized use of the public land is in violation of the Federal Land Policy and Management Act of 1976 (43 U.S.C. 1732[j]) and Title 43 CFR Part 2800.

BLM suggested a meeting to discuss the situation. BLM stated that it enclosed a map describing the trespass, but it failed to do so.

On April 13, 1993, John Alexander's secretary called BLM to ask about the trespass notice and to advise that the map had not been enclosed. BLM faxed a copy of the map to her immediately and, at her request, also described the trespass to her.

The case record indicates that the unauthorized use was that "approximately 15 acres are fenced within the private lands with an unauthorized fence." (Unauthorized Use Investigation Report dated March 31, 1993.) The fence was approximately 1,400 feet in length. Id. There was also an unauthorized access road 1,200 feet in length crossing Federally-owned lands, running through a gate in the unauthorized fence. Id.

The trespass fence enclosed approximately 15 acres of Federally-owned land in the NW¹/₄SW¹/₄NW¹/₄ and the N¹/₂NE¹/₄SW¹/₄NW¹/₄ of sec. 9, T. 29 S., R. 4 E., Wayne County, Salt Lake Meridian. (Initial Report of Unauthorized Use, dated March 30, 1993.) It was discovered on March 30, 1993, during an on-the-ground investigation for a right-of-way application for Garkane Power Association (Garkane) to construct a powerline across public land to

1/ In a conversation record dated March 30, 1993, BLM noted that the Wayne County (Utah) Recorder had confirmed that the owner of lands adjoining the trespass lands was Karin Alexander Baxter, identified as the daughter of John T. Alexander. Despite that, BLM repeatedly named John T. Alexander as the "property owner." See, e.g., Request of Real Estate Appraisal dated Apr. 23, 1993. That is explained by the fact that Alexander repeatedly referred to the land as his. See, e.g., Letter dated June 8, 1993, from Alexander to BLM. It is unclear whether Alexander did own the property or was acting on his daughter's behalf. In either case, he had authority to pursue the matter before this Board, as he is either adversely affected by BLM's decision (43 CFR 4.410(a)) or may represent his family member.

provide power for an irrigation pump on Alexander's private land. (Id.; Conversation Record dated March 30, 1993.) ^{2/} BLM's reporting officer described the unauthorized use as "inadvertent" and "non-willful" and recommended that BLM "require the fence to be removed and require application for the driveway road." Id.

On April 23, 1993, BLM requested a real estate appraisal of "trespass charges for the land." BLM noted in that request that "[t]he area is considered being trespassed," that "[t]he trespasser has a fence [that] excludes other public land users," and that "[t]he trespass appears to be inadvertent and existed prior to his purchasing the adjacent private land."

On April 26, 1993, Alexander called BLM, and a BLM employee recorded the conversation as follows in an April 26, 1993, conversation record:

Mr. Alexander called to discuss the trespass and to ask for an expedited review in order to issue a [right-of-way] to Garkane for their irrigation pump system. I told Mr. Alexander that we [(that is, BLM)] could not issue the [right-of-way] prior to 5/23/93 because of the 30 day public protest period. Mr. Alexander said he did not know the trespass existed and is willing to do whatever we want to settle the matter. I suggested he send a letter with his recommendations and we would consider his proposal. We would need to issue a [right-of-way] for his access road.

I recommended he move his fence to the private land boundary and make application for the road [right-of-way.] He said he would send a letter this week detailing his proposal.

On May 11, 1993, a letter was filed over Alexander's signature with BLM stating as follows:

I have no problem with meeting the requests and requirements of the [BLM] regarding the discovered problem with the property line. In accordance with your instructions and request, we will proceed within the next several weeks to secure a survey of the property line and will move our fence and gate in accordance with the proper survey.

This existing fence and gate has, as you know, been in existence there for probably at least fifty years, or possibly more, and naturally it came as a surprise to me that this was off of the proper property line. We are most happy to conform with the requests.

^{2/} The present record does not explain what happened to Garkane's application.

On May 11, 1993, BLM issued the following decision letter:

We received your letter dated May 7, 1993, wherein you stated that you would proceed in getting the property surveyed and the fence moved to the property line. We appreciate your prompt response to our notice.

In addition to moving the fence, we also request that you make application for your access road. This road crosses the public land and is approximately 1100 feet in length and 15 feet in width. An application form * * * is enclosed for your convenience.

The cost reimbursement provisions of 43 CFR 2803.3-1, establish a cost recovery fee schedule for both processing and monitoring fees. It has been determined that your access road falls under Category II (refer to Cost Recovery Determination Record, attached). Under this category, you are required to pay a non-refundable application processing fee in the amount of \$300.00 before we can take further action on your application. In addition to the processing fee, you may also submit payment of the monitoring costs for Category II in the amount of \$75.00.

BLM enclosed a copy of its category determination. BLM also expressly notified Alexander of his right to appeal the decision, but initially neglected to provide a copy of Form 1842-1, Information on Taking Appeals to the Board of Land Appeals. That omission was cured on May 24, 1993, when BLM forwarded a copy of that form to Alexander.

On June 16, 1993, Alexander responded as follows:

I had requested a change in the location of power poles from Garkane Power in Wayne County, Utah. This required the power company to secure an easement from BLM for two poles adjacent to my private land.

On inspection of the site, the BLM discovered an inadvertent trespass, and accused me (letter enclosed) of 1) placing a fence on government property and 2) using public access road without a permit.

I purchased the adjacent farm 7-8 years ago. Local residents tell me that the fence is probably 50-60 years old (perhaps more) and that the road has been the access road to the farm for perhaps 90-100 years.

Since the 15 acres involved is of no great significance to BLM or myself, I am happy to comply with their request and move the fence and gate as so indicated to them by letter.

However, charging me \$375.00 for the privilege of applying for a permit to use a hundred year-old road seems not just a little unreasonable. If this were private ground, a long term easement would have been established years ago. The same privilege should be offered in any case such as this.

I would place a road on my property, but due to the build-up of the highway in the area it is all but impossible. Therefore, I appeal this action as unreasonable and unnecessary under such circumstances.

Also, the Bureau used extortion by refusing to grant the easement to Garkane in case I refused to cooperate. I have always been cooperative with the government agencies and this action was uncalled for. The delay caused damages to our crops by not being able to get power to our pumps on time.

Presumably because this letter was not styled a "notice of appeal" and did not mention the Board of Land Appeals, on June 23, 1993, BLM inquired of Alexander whether he intended to appeal to this Board:

Your letter also suggested that you wish to appeal the trespass action and the necessity [of] applying for a right-of-way. If you wish to appeal this action to the Interior Board of Land Appeals, you must follow the guidance in Form 1842-12 that was sent to you. If you are only commenting on the matter, we will continue processing the right-of-way application and close-out of the trespass case. We will await your response in this matter.

On July 2, 1993, BLM received a telephone call from Alexander. BLM described Alexander's comments as follows in a conversation record dated on that day:

[Alexander] objects to the application and the necessity of getting a [right-of-way] when the road has been in place for many years. I explained the regulation and requirement to receive fair market value for use of the public land. Mr. Alexander said he did not intend to appeal to IBLA for relief of the application fees but that he wanted to express his opinion on the whole [right-of-way] process and trespass actions. I asked him if he would send a letter stating his change in appeal and send a copy to IBLA. He said he would send it out today.

BLM noted that it would "continue processing the" right-of-way.

Accordingly, on September 24, 1993, BLM notified Alexander that it was ready to issue a right-of-way for the access road to his private property. However, BLM advised that, under 43 CFR 2801.3, it could not do so until the trespass issue was settled. BLM requested that Alexander notify it when the survey of the property line and realignment of the fence

was completed, so that it could close the trespass case without penalty and immediately offer the right-of-way.

When no response was received, on November 9, 1993, BLM sent a second letter to Alexander advising that it was ready to issue his access road right-of-way, but could not do so until the trespass was resolved. BLM invited him to contact it when the survey was completed and the fence removed to the appropriate survey line, or, alternatively, when the fence was removed from the public lands. BLM cautioned that, if Alexander chose "not to remove the fence, formal trespass charges [would have to] be assessed and payment demanded for all costs including unauthorized use, occupancy, and administrative costs." (Letter dated Nov. 9, 1993.)

On November 18, 1993, Alexander filed his response. He stated that he would like to proceed to receive the right-of-way. As to resolving the trespass, he stated:

I have not been able to secure a survey of the property line and, also, it has not been possible for me to re-fence and move the gate at this point. I would like to request, and would be greatly appreciative if you could extend this time to the spring. As we have cows in this area and because of the weather at the present time, it would be next to impossible for us to put in a new fence and gate in order to contain the cows.

Alexander also requested that BLM help him "determine the line of the fence," meaning the new fence, "as it would save [him] a lot of expense as well as trying to get someone out there to do an official survey." He stressed his acceptance of BLM's decision: "I would greatly appreciate any help that you could give me in this line as I do want to cooperate with your office and have no reason not to be cooperative."

On December 20, 1993, BLM acceded to the request for additional time, but reiterated that the right-of-way would not be issued until the trespass was settled.

In May 1994, BLM contacted Alexander to remind him that the fence had not been realigned. On May 27, 1994, BLM advised Alexander in a telephone call that it was not necessary for him to construct a new fence on the boundary, but that the access right-of-way would not be issued until the unauthorized fence was removed and the enclosure of public land was eliminated. ^{3/} See undated Memorandum to File from Gary Hall at 1-2.

^{3/} The dissent appears to ignore the fact that BLM did not require Alexander to construct a new fence along the property line. BLM originally indicated that he should "move" the fence to the property line, thereby implying that he should not only remove the old fence but construct a new one. BLM's original request appears reasonable, since Utah is apparently

On June 3, 1994, BLM prepared a Staff Report summarizing the situation. Most significantly, it noted that the area had been inspected on June 2, 1994, and that the old fence had been removed. The report concluded that "the trespass [should] be closed without any trespass charges levied and Mr. Alexander informed that the case will be closed upon his acceptance of the right-of-way with the terms and conditions." BLM cited the following reasons for that recommendation that no trespass damages be assessed:

[T]he trespass was actually created by a previous owner and Mr. Alexander appears to be an innocent party[;]

the administrative costs associated with this trespass ha[ve] been only 2-3 hours at most[;]

an application for the road has been received along with the required application and monitoring fees and Mr. Alexander has removed the fence[;]

and that the main objective of having the fence removed and the access road authorized will be accomplished.

On June 3, 1994, BLM issued its decision offering Alexander the road access right-of-way and determining the annual rental to be \$10 for the period from September 1, 1993, to December 31, 1997. BLM indicated that the notice of trespass that was issued for inadvertent use of the public lands would be dismissed upon acceptance of the offer for the right-of-way. It appears that the right-of-way was accepted by Alexander on June 16, 1994. On June 28, 1994, BLM notified Alexander that the right-of-way had been approved on June 27, 1994, and enclosed a copy of the right-of-way grant. It stated that the rental from June 27, 1994, to December 31, 1998, had been determined to be \$10.00. It further stated that the "issuance of this right-of-way grant constitutes a final decision" and informed Alexander of this right to appeal to this Board.

On July 28, 1994, Alexander filed the following appeal:

Official appeal is being made regarding the handling of a supposed trespass on BLM land.

* * * I appeal and ask for a \$300.00 refund for application for the permit that has been issued. This charge is unreasonable under the circumstances. I am also including a request for reimbursement of costs in removing the stated fence. I did not construct the fence. It

a "fence-in" State, where a rancher is required to fence his cattle in his property or face civil liability for any damage inflicted by cattle trespassing on his neighbors' property. See Utah Code Sec. 4-25-8(1). However, BLM plainly abandoned that position in May 1994, concluding that it was up to Alexander whether or not to erect a new fence on his property line.

has been there for 75 years and is obviously the property of BLM. I removed the fence under coercion by BLM who refused to grant the permit unless I removed BLM's fence.

Please remit the \$300.00 application fee, plus \$128.00 for (2 people x 8 hours) removal of the fence.

(Notice of Appeal at 1.) No additional reasons for appeal have been submitted.

[1] The Federal Land Policy and Management Act of 1976 (FLPMA), 43 U.S.C. § 1761(a)(6) (1994), authorizes issuance of right-of-way grants for roads across public lands, and 43 U.S.C. § 1764(g) (1994) requires a right-of-way applicant to reimburse the United States for reasonable administrative and other costs incurred in processing the application and in monitoring construction and operation pursuant to the right-of-way. See also 43 CFR 2808.1(a). The provisions governing reimbursement of the costs of application are set out at 43 CFR Subpart 2808.

Under 43 CFR 2808.2-2(a), BLM must determine the appropriate category and collect the required application processing fee. BLM must also make a record of its category determination and give it to the applicant. The record shows that BLM complied with that requirement by providing a copy of its category and fee determination record to Alexander along with its May 11, 1993, letter.

BLM properly selected Category II for Alexander's application. Under the regulations, a Category II application is one for which (1) data necessary to comply with the National Environmental Policy Act of 1969 (NEPA) are available in BLM's office or from data furnished by the applicant, and (2) one field examination is required to verify existing data. 43 CFR 2808.2-1(a)(2). The record contains an environmental assessment (EA) prepared by BLM to comply with NEPA. It appears that the data necessary for that EA was assembled from data that was available to BLM, and Alexander has not shown otherwise on appeal. Although the record shows that BLM undertook more than one field examination, it is likely that at least one field examination was necessary to verify environmental data. Accordingly, we find no fault in the fact that BLM minimized Alexander's application costs by selecting Category II, rather than a higher category.

The record here shows that BLM complied with and carried out the administrative directives for recovering administrative costs of a Category II right-of-way grant. It is well established that an appellant challenging a BLM decision has the burden of supporting his allegations with evidence showing error. Alexander has not met that burden.

[2] BLM also properly found that the fence was in trespass and properly required Alexander to remove the fence at his own expense. The fence in question enclosed approximately 15 acres of Federal lands, effectively adding them to Alexander's adjacent private lands. It was being used by Alexander both to define the boundary of his property and to contain cattle in the area.

Departmental regulations define "trespass" generally as "any use, occupancy or development of the public lands or their resources without authorization to do so from the United States where authorization is required, or which exceeds such authorization." 43 CFR 2800.0-5(u). Enclosing public lands by fencing them is itself an act of trespass; it is axiomatic that no legal entitlement is created by illegally enclosing lands. 43 U.S.C. § 1061 (1994); 43 CFR 9239.2-1; Double J Land and Cattle Co., 126 IBLA 101, 105 (1993) (affirmed in relevant part, Double J Land & Cattle Co. v. U.S. Dept. of the Interior, 91 F.3d 1378 (10th Cir. 1996)). The regulations specifically governing enclosures prohibit "constructing or maintaining any kind of improvements, structures, fences, or enclosures on the Federal range * * * without authority of law or a permit." (Emphasis supplied.) 43 CFR 9239.2-1(c).

Considering these regulations together, it is clear that any unauthorized use of a fence on Federally-owned lands to delineate a boundary and to contain cattle amounts to trespass. See Double J Land and Cattle Co., *supra*. Although Alexander clearly did not "construct" this fence, he "maintained" it in use by not removing it for a period of 7 or 8 years after acquiring the lands in question. He "used" the fence during that time both to delineate the boundary of the lands he claimed and to fence his cattle within those lands. 4/

Alexander repeatedly openly admitted that the fence was his and/or his daughter's and accepted his responsibility to remove it. Thus, by letters dated May 7 and May 11, 1993, he told BLM:

I have no problem with meeting the requests and requirements of the [BLM] regarding the discovered problem with the property line. In accordance with your instructions and request, we will proceed within the next several weeks to secure a survey of the property line and will move our fence and gate in accordance with the proper survey.

(Emphasis supplied.) This statement not only admits ownership of the fence, it points out that there was a gate in the fence allowing access to Alexander's property. The presence of the gate and access road is consistent with the fact that the fence was being used to delineate the boundary of Alexander's property, since there was no other gated fence.

In the two May 1993 letters, Alexander pointed out that the fence had "been in existence there for probably at least fifty years, or possibly more." The fact that Alexander did not personally build the fence does not

4/ Under Utah law, the owner of cattle apparently must fence his cattle in so that they will not trespass on neighboring property. See Utah Code Sec. 4-25-8(1); n. 3 above.

alter the fact that it was in trespass or relieve him from the responsibility of removing it, as he maintained the fence for 7 or 8 years after acquiring the property and was using it to delineate his property boundary and to keep his cattle in. 43 CFR 2800.0-5(u) and 9239.2-1(c); see also 75 Am. Jur. 2d §§ 25 and 52.

As noted above, in his June 8, 1993, response, Alexander continued to express acceptance of BLM's request that he "move" the fence. Obviously, moving the fence would entail removing it from its present location. 5/

The record also shows that Alexander was using the fence to retain his cattle within the fenced private and public lands. Most significantly, on November 16, 1993, Alexander wrote to BLM, openly acknowledging that he was grazing cows within the area enclosed by the fence in question and that the fence was very important in containing them:

I have not been able to secure a survey of the property line and, also, it has not been possible for me to re-fence and move the gate at this point. * * * As we have cows in this area and because of the weather at the present time, it would be next to impossible for us to put in a new fence and gate in order to contain the cows.

(Emphasis supplied.) That statement shows that, in November 1993, there were cattle within the fenced area of private and public lands in the trespass area and the trespass fence was being used to contain them. 6/

There is ample evidence in the record (referenced above) showing that Alexander used both the trespass fence and the enclosed lands. BLM properly determined that there was a trespass here. There being a trespass, BLM was authorized to require the removal of improvements placed on lands in trespass, even if placed there unintentionally or inadvertently. Douglas Noland, 139 IBLA 337 (1997); Clive Kincaid, 111 IBLA 224 (1989). A trespasser must either "rehabilitate" lands harmed by the trespass himself or pay the costs incurred by the United States in doing so. 43 CFR 2801.3(b)(3). Alexander, by removing the trespass fence, was rehabilitating the lands as required. He properly bore the financial burden of removing the fence.

5/ The only matter Alexander objected to was the reasonableness of BLM's charge of \$375 to apply for a new road right-of-way. The assessment for that charge is affirmed herein.

6/ The dissent states (157 IBLA at 29) that "BLM could have removed the fence at any time, and Alexander would not have been damaged by BLM's action." That statement is based on an undated memorandum, memorializing a May 27, 1994, telephone conversation with Alexander, in which the BLM employee noted that Alexander stated that "he really had no reason to construct a new fence on the property boundary, other than to comply with the BLM requirement to do so." Alexander was told by BLM at that time that he did not have to construct a new fence, only that he had to remove

[3] The dissent would remand the matter to BLM because BLM failed to determine whether the existing road was cognizable under section 8 of the Act of July 26, 1866 (R.S. § 2477), repealed by section 706(a) of the Federal Land Policy and Management Act of 1976. R.S. § 2477 reads: "And be it further enacted, that the right of way for construction of highways over public lands, not reserved for public uses, is hereby granted." One seeking to enforce an R.S. § 2477 right-of-way against the Federal government bears the burden of proof to establish the validity of its claim. Southern Utah Wilderness Alliance v. BLM, 147 F.Supp. 2d 1130, 1136 (D. Utah 2001). In this case the record shows that Alexander concedes that the road is not a public road. In the right-of-way application, he stated: "The access road to this farm has been in existence (as far as I can determine) for 75-100 years. To my knowledge it has never been a public road - only used to access this farm." Such an admission is inconsistent with the existence of an R.S. § 2477 right-of-way. See Nick DiRe, 55 IBLA 151, 155-56 (1981). Further, in the absence of a written application by Alexander (or other party seeking to designate the road for use under R.S. § 2477), this Board should not pursue the question on his behalf. See Secretary's Memorandum to Assistant Secretaries dated Jan. 22, 1997, at 2. ^{7/}

The dissent relies on "continuous use" as the basis for a conclusion that there is a "good probability" that Alexander's access road is an R.S. § 2477 right-of-way, citing Lindsay Land & Live Stock Co. v. Chumos, 75 Utah 384, 285 P. 646, 648 (1929). (Dissent at 157 IBLA at 27.) The district court in Southern Utah Wilderness Alliance v. BLM, *supra* at 1138-43, however, rejected the argument posited by several Utah counties, relying in part on the Lindsay Land case, that the term "construction" in R.S. § 2477 requires only "continued use." The court held that "the 'intentional physical labor' interpretation applied by the BLM" in rejecting the counties' claims to R.S. § 2477 rights-of-way was the "most persuasive." *Id.* at 1143. The court also stated:

In a recent decision, this court adopted the interpretation of "construction" applied by the BLM. In United States v. Garfield County, 122 F.Supp. 2d 1201 (D. Utah 2000), the court referred to a 1982 DOI opinion letter when defining the phrase "construction" within the meaning of R.S. § 2477."

the one in trespass. Although in May 1994, Alexander may have had no need for a new fence, in November 1993 he had indicated to BLM that he was using the old fence to contain cattle.

^{7/} That memo provides: "An entity wishing the Secretary or any agencies of the Department to make a determination whether an R.S. 2477 right-of-way exists shall file a written request with the Interior agency having jurisdiction over the lands underlying the asserted right-of-way, along with an explanation of why there is a compelling and immediate need for such a determination." (Memo at 2.) If Alexander desires his private access road to his farm to be designated as a public highway, he may file an application with BLM, as required by the Secretary's policy.

Construction ordinarily means more than mere use . . . [T]here must have been the actual building of a highway . . . [W]e think such a road can become a highway within the meaning of R.S. 2477 if state or local government improves and maintains it by taking measures which qualify as "construction"; i.e. grading, paving, placing culverts, etc.

Id. at 1227 n. 35 * * *.

Southern Utah Wilderness Alliance v. BLM, supra at 1141. Thus, there is no valid reason to remand the present case to BLM for consideration of the existence of an R.S. § 2477 right-of-way. By the same token, in the absence of citation by appellant of any authority for such action, we find no need to remand the matter (as suggested in the Dissent at 157 IBLA at 36) to determine whether there was a "prescriptive easement."

[4] We do not agree with the dissent that, in requiring that Alexander remove the fence (and, thus, clarify the land trespass issue) before granting the road right-of-way, BLM overreached the scope of the regulations. The regulation at 43 CFR 2801.3(e) expressly prohibits granting of "any right-of-way * * * application" until all trespass issues are settled. See also 43 CFR 9239.7-1. BLM was thus without authority to issue the road right-of-way until the newly-discovered trespass was resolved. This is not coercion, but instead reflects a sound Departmental policy requiring resolution of unauthorized uses of the public lands and removal of unauthorized improvements. 8/ Once the trespass was resolved, BLM properly issued the right-of-way following receipt of reimbursement of its administrative expenses in adjudicating the application and a token (\$10 per year) annual rental. 9/

8/ We note that 43 CFR 2801.3(e) states broadly that "issuance of any right-of-way" (emphasis supplied) is prohibited, not just issuance of a right-of-way to the trespasser. Adjudication of the question of whether that policy, as the dissent proclaims, would result in the denial of applications for a right-of-way to a "major transmission line delivering power to a vast area" (Dissent at 157 IBLA at 25), or other hypothetical situations, must await an appeal presenting such facts. In such an appeal, we might hold that the regulation bars issuance of a right-of-way that exclusively benefits a trespasser, even if not issued to the trespasser himself.

9/ While there is some indication in the record that Alexander could have continued to use the road under the "casual use" definition in 43 CFR 2800.0-5(m), BLM, in its May 11, 1993, letter to Alexander, requested that he apply for a right-of-way for his access road. In response, Alexander filed a FLPMA right-of-way application for the road. As BLM stated at page 2 of the "Plan Conformance/NEPA Compliance Record," prepared in response to the application: "Maintenance would be allowed on an as needed basis to upgrade the road as conditions change. This right-of-way grant would allow for upgrading the road from the existing small track to an all weather paved road that would provide access for future expansion of the

The dissent also states that BLM either required Alexander to erect a fence along the true property line or led him to believe that he must do so. It is enough that BLM clarified that it was up to Alexander whether or not he built a new fence on the property line, so long as he removed the trespass fence and eliminated the enclosure of public land.

The dissent opines that BLM incorrectly applied 43 CFR 2801.3 by refusing to issue a right-of-way for a powerline to Garkane until Alexander's trespass was resolved. (Dissent at 157 IBLA at 25.) However, the record is extremely sketchy as to what transpired concerning the right-of-way for Garkane's powerline. It may be that BLM did issue that right-of-way. However, even assuming arguendo that BLM did refuse to issue the right-of-way to Garkane, the propriety of such action is not before us, as Alexander failed to meet his burden of demonstrating impropriety in BLM's treatment of Garkane's right-of-way.

Finally, the dissent asserts that BLM has authority to reimburse Alexander for expenses incurred in removing the fence by treating the removal of the fence as a "range improvement." Removal of the fence is not a "range improvement" made by Alexander; he is not entitled to be reimbursed for its cost on that basis. The regulations in effect in 1994 when Alexander removed the fence defined "range improvement" as follows:

Range improvement means an authorized activity or program on or relating to rangelands which is designed to improve production of forage; change vegetative composition; control patterns of use; provide water; stabilize soil and water conditions; and provide habitat for livestock, wild horses and burros, and wildlife. The term includes, but is not limited to, structures, treatment projects, and use of mechanical means to accomplish the desired results.

43 CFR 4100.0-5 (1993). The regulation concerns programs such as reseeding, irrigation and water control, and other large-scale projects. See generally Loyd Sorensen, 41 IBLA 354 (1979). Removal of a 1400-foot fence to clarify land ownership does nothing to meet the objectives set out in 43 CFR 4100.0-5 (1993); accordingly it is not a "range improvement." In any event, the regulations in effect in 1994 authorized the expenditure of Federal funds on range improvements only upon completion of a cooperative agreement between BLM and the party seeking to make the improvement. See 43 CFR 4120.3-2 (1993). BLM has no authority to refund money to Alexander for removal of the fence as a "range improvement," since that action was not taken pursuant to a cooperative agreement, was not needed to meet an urgent situation to improve the general condition of the range, and was not approved in a land use plan. See Loyd Sorensen, 41 IBLA at 357.

private property." Thus, conversion of the access road to a FLPMA right-of-way provided substantial benefits to Alexander, allowing him to maintain and upgrade the road.

Finally, we note that this order is not to be construed as signaling our future countenance of certain actions by both parties concerning the filing of appeals. When, within 30 days of issuance of a decision that is appealable to this Board, BLM receives a document in which the author employs the word "appeal," BLM should forward the case file to the Board immediately. See Thana Conk, 114 IBLA 263, 273 (1990). It is not within BLM's purview to question the intent of the author of such document. However, a party wishing to appeal a BLM decision setting forth the conditions that must be met before a right-of-way can be processed must do so within 30 days. 43 CFR 4.411(a). When a timely appeal of a decision setting forth conditions is withdrawn after the appeal period has expired, a later appeal challenging the same conditions after the right-of-way has been granted can be dismissed as untimely. 10/

Accordingly, pursuant to the authority delegated to the Board of Land Appeals by the Secretary of the Interior, 43 CFR 4.1, the decision is affirmed.

David L. Hughes
Administrative Judge

I concur:

Bruce R. Harris
Deputy Chief Administrative Judge

10/ There is no need, as the dissent urges, for a remand to BLM to consider the matter in the posture it took as of the filing of Alexander's June 16, 1993, letter. It is established that it is appropriate to decline to remand a matter to BLM when to do so would serve no useful purpose and where consideration of the matter at the Board level would facilitate ultimate resolution thereof. See Kenneth W. Bosley, 101 IBLA 52, 55 (1988); Beard Oil Co., 97 IBLA 66 (1987); Robert C. LeFaivre, 95 IBLA 26 (1986). We have no reason to doubt that, if we vacated all actions that BLM took after June 16, 1993, and remanded the case for further action, BLM would reach the same conclusion it reached in 1994. Further, all issues presented in Alexander's June 16, 1993, letter have been fully addressed herein, so that his due process rights have been protected.

ADMINISTRATIVE JUDGE MULLEN DISSENTING:

I do not know what disturbs me more, the BLM's actions leading to this appeal or my colleagues' willingness to ignore those actions.

I believe that BLM: 1) prematurely issued a trespass notice without having undertaken sufficient investigation to determine whether a trespass existed; 2) failed to properly forward an appeal to this Board; 3) improperly lead an alleged trespasser to believe that if he appealed to this Board, BLM could not issue a right-of-way to a third party until this Board issued a decision; 4) refused to issue a right-of-way to a power company because one of its customers was considered to be in trespass; 5) failed to consider the existence of a public road or common access right when determining the existence of a trespass, the need for a right-of-way, or the proper right-of-way rental and terms; and 6) improperly demanded that a party remove a fence on BLM land and construct a fence at another location. During their consideration of this appeal my colleagues have chosen to ignore these improper actions.

I am reminded of an early Board holding, addressing the limits of our jurisdiction. In A.W. Shunk, 16 IBLA 191, 81 I.D. 401 (1974), we held that "[i]n the exercise of its delegated authority pursuant to 43 CFR 4.1, the Interior Board of Land Appeals need not limit its review to a narrow issue where to do so would preserve error or inequity.

Background.

The lay of the land.

Just to the north of Teasdale, Utah, the Freemont River flows east-west through arid uplands typically found in southern Utah. The bottom land along the river was homesteaded over 100 years ago, and is patented. The arid land to the north and south, which is incapable of supporting crops, remains in Federal ownership. The land to the north is managed by the Forest Service, and the land to the south is managed by the Bureau of Land Management (BLM). Photographs in the case file show what appear to be alfalfa or hay fields on the patented bottom land.

Traveling west on Utah State Road 24, about ½ a mile from its intersection with the Teasdale Road, a road branches to the right (north), and crosses Federal lands in the SW 1/4 of the NW 1/4 of Section 9, T 29 S, R 4 E. About 200 yards from its intersection with State Road 24 a fence line crosses this road. About 200 yards further the road enters private homesteaded land. Statements in the record by both BLM and Alexander indicate that this road has been in existence and use for about 100 years, and is the only means of gaining access to Alexander's farm.

How the "trespass" was discovered.

Alexander, a California doctor who owns a cattle business (Alexander and Sons Cattle Company) in Utah, purchased a farm on the Freemont river in the late 1980's. ^{1/} Some time before March, 1993, Alexander's daughter, Karin Alexander Baxter, who was managing the property, had asked Garkaine Power Association, Inc. (Garkaine), a local power company, to change the location of two power poles. Doing so would allow Alexander to deliver power to an irrigation system on his property.

Garkaine was required to obtain an easement from BLM before it could move the power poles to the new location. The earliest document in the case file is a March 30, 1993, Conversation Log memorializing a conversation with the Wayne County Recorder regarding the ownership of the NW¼, sec. 9, T. 29 S., R. 4 E., Salt Lake Meridian. The BLM employee who authored the memorandum noted that Garkaine was seeking a right-of-way to provide power to an irrigation pump on Alexander's farm. The memo states that a trespass was discovered during the inspection of the proposed route of the power line.

The nature of the "trespass."

The alleged trespass was subsequently described as two separate and distinct trespasses. The first "trespass" was Alexander's use and maintenance of the 400 yard long road across BLM land. It was initially estimated that this road covered about 1 acre, but the area was later reduced to 0.4 acres. It is undisputed that this road has existed and has been in use for over 100 years, and that it is the only access to the Alexander farm.

^{1/} Alexander said he had been owner of the farm for "seven or eight years" prior to having been cited for trespass. (Application for Transportation and Utility Systems and Facilities on Federal Lands, dated May 18, 1993.

The second “trespass” is a 14 acre triangular tract bounded on the north and west by Alexander’s land and on the south by the above described fence which runs diagonally from Alexander’s land on the north to his land on the west. The fence had been erected by some unknown party 50 to 60 years before BLM discovered Alexander’s “trespass”. Neither BLM nor Alexander could identify who had erected the fence or when it was erected. BLM speculated at one point that the fence may have been erected by the Utah Department of Transportation and extended by someone other than Alexander. (See BLM Staff Report dated June 3, 1994 at 1.) The same report states that “the trespass was actually created by a previous owner and Mr. Alexander appears to be an innocent party.” (*Id.* at 2.) There is no evidence in the record that Alexander ever actually used occupied or developed any portion of the 14 acre tract in any way. He did not grow any crops on it, and there is no report of livestock having ever been observed on the “trespass” land. ^{2/} However, there is an implication that Alexander maintained the fence, and the lead opinion makes much of the fact that he maintained and used the gate where the fence crossed the pre-existing road.

The Premature Trespass Notice

BLM’s initial “finding” of trespass.

On March 31, 1993, the Henry Mountain Resource Area Manager wrote a letter to Alexander stating that a

recent examination of the public land located adjacent to your property near Torrey, Utah, indicates that you may be using public lands without authorization. It appears that you have fenced approximately 15 acres of public land and are using an access road without proper authorization.

(March 31, 1993, letter at 1.) The letter also stated that the Resource Area Manager “would appreciate meeting with you to discuss this situation. * * * I am confident that we can work together in arriving at an agreeable solution.” *Id.* The letter noted that a map was enclosed showing the location of the trespass. The letter contained no statement that the trespass notice was a final decision or information regarding how an appeal could be taken.

^{2/} In a May 5, 1993, Memorandum, BLM estimated that the 14 acres could support no more than one animal unit month per year. This equates to enough forage to support one cow for one month. It would take 168 acres of similar land to support one cow for one year. See also photographs of the “trespass area.”

A conversation record dated April 14, 1993, notes that Alexander's secretary called BLM, stated that the March 31 letter to Alexander did not have a map enclosed, and asked BLM to fax a copy of the map to Alexander. A copy of the map was faxed to Alexander that day.

Without further notification or apparent conversation with Alexander, BLM ordered a real estate appraisal on April 23. The request stated that "The trespasser has a fence that excludes other public land users. The trespass appears to be inadvertent and existed prior to his purchase of the adjacent land."

BLM Issued a Trespass Decision and Alexander Appealed.

The BLM Trespass Decision.

On May 11, 1993, BLM issued a decision citing Alexander for trespass. The decision noted that Alexander said that he would have his property surveyed and erect a fence along the property line. In addition, Alexander was told that he must apply for a right-of-way for the road to his farm. The decision contained the following determinations regarding the right-of-way-grant for the road:

It has been determined that your access road falls under Category II * * * . Under this category you are required to pay a non-refundable application processing fee in the amount of \$300.00 before we can take further action on your application. In addition to the processing fee, you may also submit payment of the monitoring costs for Category II in the amount of \$75.00.

(May 11, 1993, BLM Letter at 1.) 3/

The decision then stated that "[w]ithin 30 days of receipt of this letter, you have the right of appeal to the Board of Land

3/ The regulation in effect in May 1993 governing category determinations was 43 CFR 2808.2-2, the regulation governing application processing fees was 43 CFR 2808.3-1, and the regulation governing reimbursement of monitoring costs was 43 CFR 2808.4. A Category II right-of-way application was defined at 43 CFR 2808.2-1(a)(2) as one "for which the data necessary to comply with the National Environmental Policy Act and other statutes are available in the office of the authorized officer or from data furnished by the applicant; and a field examination to verify existing data is required."

Appeals * * *. If an appeal is taken you must follow the procedures outlined in the enclosed Form 1842-1 * * *.” This was the first time that any correspondence initiated by BLM took the form of a decision or informed Alexander that he had a right to appeal to this Board.

A note from Alexander, received by BLM on May 21, 1993, stated that Form 1842-1 had not been included with BLM’s May 11, 1993, Decision, and asked BLM to send one to Alexander as soon as possible. On May 24, 1993, BLM sent a Form 1842-1 to Alexander and apologized for having failed to enclose the form with its decision. The Decision was properly served on Alexander upon receipt of the May 24, 1993, letter enclosing Form 1842-1.

Alexander’s Timely Appeal

On June 8, 1993, Alexander wrote to BLM, strongly protesting its actions. Alexander noted that he had asked the power company to change the location of two power poles, and that, to do so, the power company was required to obtain an easement from BLM. He further noted that, while processing the power company's application for an easement, BLM "discovered an inadvertent trespass, and accused me * * * of * * * placing a fence on government property and * * * using public access road without a permit." (June 8, 1993, Letter to Henry Mountain Area Manager at 1.) Alexander specifically objected to BLM's refusal to grant the easement to the power company if he did not apply for a right-of-way, stating:

Also the Bureau used extortion by refusing to grant the easement to Garkaine in case I refuse to cooperate. I have always been cooperative with the government agencies and this action was uncalled for. The delay caused damage to our crops by not being able to get power to our pumps on time.

There can be no question that the letter Alexander sent to BLM is a document that challenges a BLM decision which is adverse to the complaining party. The June 8 letter was a notice of appeal, and BLM no longer had jurisdiction to consider the existence of a trespass.

In Utah Chapter Sierra Club, 114 IBLA 172 (1990), the Board held:

[I]t is essential to the proper functioning of the Department's administrative review process that all agencies whose decisions are subject to appeal to the

Board * * * forward the complete, original administrative record to the Board within ten business days of receipt of a notice of appeal. See Save Our Cumberland Mountains, Inc., 108 IBLA 70, 84-86, 96 I.D. 139, 147-48 (1989); Dugan Production Corp., 103 IBLA 362 (1988).

Judge Hughes aptly stated that "[a] document that is styled as a "protest" is nevertheless a notice of appeal where the person filing it has been a party in a dispute and challenges a decision that has been made by BLM * * *." Thana Conk, 114 IBLA 263, 273 (1990).

When BLM renders a decision which "adversely affects" a party to the case, that party "shall have a right to appeal to the Board." 43 CFR § 4.410(a). There is no requirement that a document be labeled a notice of appeal or even use the word "appeal" and the Board has adopted a policy that a document filed objecting to a final decision should be treated as a notice of appeal. See, e.g., Arnell Oil Co., 95 IBLA 311, 318 (1987); Goldie Skodras, 72 IBLA 120 (1983). It will be construed as a notice of appeal if it challenges a BLM decision which is adverse to the complaining party. See Thana Conk, 114 IBLA 263, 273 (1990); Buck Wilson, 89 IBLA 143, 145 (1985).

William R. Smith and Sandra L. Smith, 149 IBLA 358 (1999).

"[T]he filing of an appeal to the Board removes the case from the jurisdiction of BLM pending disposition of the appeal and * * * BLM is without authority to take further action in the case pending action by the Board." Sierra Club, Grand Canyon Chapter, 136 IBLA 358, 362, n. 6 (1996); Petrol Resources Corp., 65 IBLA 104, 108 (1982). BLM was without authority to act. That is, it has no jurisdiction to make a determination that the document is not an appeal to this Board, or to fail to send the case file to this Board. 4/

An appeal was properly and timely lodged on June 8, 1993. All action taken by BLM after that date was outside its jurisdiction.

4/ Compare this Board's holdings regarding what constitutes an appeal cited above and the discussion in the lead opinion. I have great difficulty reconciling them and suspect that the readers of that discussion will as well.

BLM Attempts To Force Alexander To Withdraw His Appeal

After receipt of Alexander's notice of appeal, BLM sought to avoid having an appeal lodged with this Board. On June 23, 1983, the Area Manager sent a letter to Alexander noting receipt of his "letter commenting on the Bureau actions * * *." ^{5/} The Area Manager then states that "[y]our letter also **suggests** that you wish to appeal to the trespass action and the necessity of applying for a right-of-way." He then stated that "[i]f you are only commenting on the matter, **we will continue** processing the right-of-way-application and close-out of the trespass case." (Emphasis added.) The last line of this letter suggested to Alexander that "[i]f we can be of assistance, please contact [a named BLM employee] of my staff."

A BLM conversation record dated July 2, 1993, records a BLM employee's recollection of a conversation that transpired when Alexander contacted her in response to the Area Manager's June 23, 1993, letter. She stated that

Mr. Alexander had a **lengthy** conversation regarding the trespass actions and BLM's handling of the situation. * * * Mr. Alexander said he did not intend to appeal to IBLA for relief of the application fees but that he only wanted to express his opinions on the whole R/W process and trespass action. I asked him if he would send a letter stating his **change** in appeal and send a copy to IBLA.

(July 2, 1993 Conversation Record, emphasis in bold print added.) The file contains no letter or any other other correspondence from Alexander stating that he was withdrawing an appeal or that he did not intend to his June 8, 1993, letter to be other than an appeal, and I have found nothing to indicate that any such document was ever sent to this Board. None-the-less, the case file was not forwarded to this Board.

The Garkaine Right-Of-Way Was Improperly Delayed.

Alexander's need for electric power to run his irrigation system played an important role in the demands BLM placed upon him, and his response to those demands.

^{5/} This letter also responds to Alexander's "protest" of BLM's refusal to issue the right-of-way to Garkaine (quoted and discussed below). The importance of this "protest," and the tone and content of BLM's response is addressed in that discussion.

On April 26, 1993, Alexander called BLM. The BLM employee who talked to him wrote a Conversation Log memorializing that conversation, noting:

Mr. Alexander called to discuss the trespass and to ask for an expedited review in order to issue a [right-of-way] to Garkaine for their irrigation pump system. I told Mr. Alexander that we could not issue the [right-of-way] prior to 5/23/93 because of the 30 day public protest period. Mr. Alexander said he did not know the trespass existed and is willing to do whatever we want to settle the matter. [The author] suggested he send a letter with his recommendations and we would consider his proposal. We would need to issue a [right-of-way] for his access road.

(April 26, 1993 Conversation Report, emphasis added.)

On May 11, 1993, BLM received a letter from Alexander, which was written in furtherance of the April 26, conversation. Alexander stated that "[i]n accordance with your instructions and request, we will proceed within the next several weeks to secure a survey of the property line and will move our gate and fence in accordance with the proper survey." Alexander noted that "[t]his existing fence and gate has, as you know, been in existence there for probably at least 50 years, or possibly more, and naturally it came as a surprise to me that this was way off the proper property line." ^{6/} (Letter dated May 7, 1993, from Alexander to BLM at 1.)

The Area Manager responded to Alexander's letter by issuing his decision on the same day BLM received Alexander's letter. This decision was discussed above, but I believe it worth restating that the decision noted that Alexander agreed to have his property surveyed and erect a fence along the property line and stated that Alexander must also apply for a right-of-way for the road. In the last paragraph of his letter, the Area Manager told Alexander that:

As we discussed on April 26, 1993, the application for the road should be received before we issue a right-of-way to Garkaine Power Association, Inc. for a power line right-of-way that will provide power to the irrigation pump for your irrigation system.

^{6/} A June 1994 staff report states the conclusion that the trespass was totally inadvertent and had existed for many years.

(Area Manager Letter dated May 11, 1993, at 1, Emphasis added.)

On May 18, 1993 Alexander executed a right of way application and sent it to BLM. ^{7/} In his application he stated that “[w]hen I purchased this farm 7-8 years ago no one questioned the road and apparently it has never been thought about since the beginning of the first farm in the 1800’s.” ^{8/} On May 24, BLM acknowledged receipt of his “application for [his] unauthorized access road,” and application and monitoring fees.

Alexander’s attempt to appeal is addressed above. In his notice of appeal Alexander specifically objected to BLM’s refusal to process the Garkaine right-of-way until he filed a road right-of-way application, stating:

[T]he Bureau used extortion by refusing to grant the easement to Garkaine in case I refuse to cooperate. I have always been cooperative with the government agencies and this action was uncalled for. The delay caused damage to our crops by not being able to get power to our pumps on time.

In a June 23, 1993, letter responding to Alexander’s objection the Area Manager stated that

Your comment suggesting that the Bureau used extortion by refusing to grant a right-of-way to Garkaine Power for a power line is improper. 43 CFR 2801.4(e) authorizes the denial of any other land use application until the trespass is settled.

(June 23, 1993, BLM Letter at 1.) There can be no question that BLM refused to process the Garkaine right-of-way application until Alexander had agreed to enter into a road-right-of way agreement, removed the fence and erected a new one on his property line. Its May 11 decision states this intent. The lead opinion resolves this problem by concluding that it is not before us,

^{7/} The lead opinion dismisses the issue regarding BLM’s refusal to issue the Garkaine right-of-way until Alexander filed a right-of-way application for the road by stating that they do not know when the Garkaine right-of-way was issued. I have little problem finding that Alexander had good reason to believe that it would not be issued until he submitted a right-of way application.

^{8/} There is a suggestion that the “trespass” land was used for grazing because the owner was a “cattle company.” The same argument could be made for conclusion that a dairy farm had no livestock because the word farm appears in its title.

concluding that the “hypothetical situations” discussed below must await another day.

Under 43 CFR 2801.3(b) and 2801.3(e) a trespass “shall result in the denial of any right-of-way, temporary land use or road use application until the trespassing party has fully satisfied the trespass claim.” (Emphasis added.) See also 43 CFR 9239.7-1. This regulation is mandatory, not permissive. It prohibits the grant of a right-of-way to a trespassing party. Therefore, if Alexander was in trespass BLM could not issue a right of way to him for a power line until he corrected the trespass condition. However, BLM’s application of these regulations to withhold the grant of a right-of-way to Garkaine was improper. Garkaine did not commit the trespass cited in BLM’s decision, and Garkaine was **not** the trespassing party.

The fact that this action was arbitrary can be demonstrated by considering what would happen if it BLM were to apply the regulation uniformly. The regulations cited above do not differentiate between a rights-of-way for a line to a single user and major transmission line delivering power to a vast area. If a trespass by a party using electric power is attributable to the power company delivering that power, no right-of-way, temporary land use permit, or road use permit could be granted to the power company if any party who might receive the power that flowed through the power lines is in trespass. Applications for rights-of-way, temporary land use, and road use filed by a power company would have to be held in abeyance until there was a showing that no power transmitted by the power company would be used by a trespassing party. A right-of-way to provide power from a major power plant in Arizona to southern California could not issue if a single Southern California power company customer was in trespass. Garkaine was not in trespass, and the refusal to process the Garkaine right-of-way because its customer, Alexander, was deemed to be in trespass was arbitrary and improper. It is small wonder that Alexander might have suggested that the Bureau used extortion.

Having addressed the “procedural” matters, I will now turn to the “trespasses.”

The Trespassing Road.

As noted above, the “trespass” road has been in existence for over 100 years. There is no evidence that BLM ever attempted to ascertain when the road was built, who built it, why it was built, who used it, or how it had been used during the 100 year

period between its construction and BLM's determination that Alexander was using it in trespass. These questions were not addressed during the trespass examination, during the preparation of the right of way agreement or during the preparation of the Plan Performance/ NEPA Compliance Record. ^{9/}

In Carl H. Alber, Jr., 100 IBLA 257 (1987), we noted that "BLM should consider whether the existing access road constitutes a 'public highway' under [R.S. 2477], thereby precluding the necessity for a FLPMA right-of-way." ^{10/} 100 IBLA at 260 n.4, citing Dean R. Karlberg, supra. In that case the Land Report stated that the road had been "used for access to [appellant's] property for many years," and that "[t]his may have been sufficient to have created a 'public highway' under State law." Id. In Blue Mesa Road Association, 89 IBLA 120(1985), we stated that

If a public right-of-way has been created pursuant to R.S. § 2477 or other authority, the existence of such a right-of-way would have a direct bearing on the extent and nature of the rights which could be granted by BLM when issuing the right-of-way to appellants

^{9/} Long after citing Alexander for trespass and telling him that he must file a right-of-way application or it would not process the Garkaine application, BLM acknowledged Alexander's right of "casual use." In its September 23, 1993, Plan Performance/ NEPA Compliance Record, BLM stated that "Mr. Alexander could continue to use the existing road under 'casual use' as defined in 43 CFR 2800 without a right-of-way, however the road could not be maintained or improved." (There is no allegation of trespass because Alexander had improperly maintained or improved the road.) In a June 3, 1994, Staff Report the author stated that "[t]he access road may be considered as casual use and not require authorization." These conclusions cast serious doubt upon the viability of any allegation of trespass, without having to address any question regarding the applicability of RS § 2477. Alexander was never advised of these conclusions.

^{10/} Section 8 of the Act of July 26, 1866, 43 U.S.C. § 932 (1970), commonly referred to as R.S. 2477, was repealed by section 706(a) of FLPMA. However, valid existing rights established under R.S. 2477 prior to October 21, 1976, were preserved by section 701(a) of FLPMA. See, Sierra Club v. Hodel, 848 F.2d 1068, 1078 (10th Cir. 1988) overruled on other grounds, Village of Los Ranchos De Albuquerque v. Marsh, 956 F.2d 970, 973 (10th Cir. 1992), quoted in Southern Utah Wilderness Alliance v. Bureau of Land Management, 147 F.Supp.2d 1130, 1133 (U.S. Dist. Ct. D. Utah, Central Division (2001)).

pursuant to FLPMA. The record before us is not sufficient to make a determination regarding the existence or extent of a R.S. § 2477 right-of-way, so we must remand this case for consideration of this matter at the District level. If it is determined that a R.S. § 2477 right-of-way exists, its extent should be taken into consideration when calculating the fair market rental value of the rights-of-way granted to appellants under FLPMA.

(Id. at 126.)

There is a good probability that a R.S. 2477 right-of-way exists. As noted in Lindsay Land & Livestock Company v. Churnos, 285 P. 646 (1930), in Utah, during much of the time that the road was in existence, Utah law provided that “A highway shall be deemed and taken as dedicated and abandoned to the use of the public when it has been continuously and uninterruptedly used as a public thoroughfare for a period of 10 years.” Under Utah law, continuous and uninterrupted public use for a period of 10 years created a R.S. § 2477 road. 11/

Two issues are presented by BLM’s failure to undertake the required examination and R.S. § 2477 right-of-way determination. First, if there is an existing right-of-way Alexander was never in trespass. Second, as noted in the Blue Mesa case, the existence of an R.S. § 2477 right-of-way would directly affect many of the terms and conditions of the right of way grant, if in fact one was deemed necessary. The lack of any examination of this question when all parties recognize that the road to Alexander’s farm existed for 100 years, is sufficient to require that we set aside the decision and remand the case to BLM for its further consideration of this question.

11/ It was not necessary to have any public funds spent for road construction or maintenance, as is the case in some states. It is not insignificant that BLM consistently referred to the Alexander “road.” The lead opinion relies on Southern Utah Wilderness Alliance v. BLM, 147 F. Supp. 2nd 1130. (D. Utah 2001) in support of its refusal to consider a RS § 2477 right-of-way. An examination of that case discloses that there is a vast difference between the trails and ways discussed in that case and the road to Alexander’s ranch, pictured in the photographs in the file. This is not a jeep trail. It is an actively used road providing access to a working farm. Compare United States v. Dunn, 478 F.2d 443 (9th Cir. 1973).

The issue cannot be dismissed because Alexander may have said that he believed that the “trespass” road was a private road. When BLM directed Alexander to file an application, he was asked if he wanted a public road. Alexander responded that he would prefer a private road. ^{12/} However, Alexander does not have the authority to turn a R.S. § 2477 road into a private road. The “trespass” road is on BLM managed Federal land. Alexander’s personal desires and beliefs would have no bearing on any R.S. § 2477 determination.

Nor can the issue be resolved by noting that the road in question runs from a State road to private land.

User is the requisite element and it may be by any who have occasion to travel over public lands, and if the use be by only one it still suffices. “A road may be a public highway though it reaches but one property owner. 29 C.J. 376. He has a right to access to other roads and the public has a right of access to him.

(Leach v. Manhart, 77 Pac.2d 652-653 (Colo. 1938).) In addition, Utah State Road 24 is paved and built for high speed travel. It cannot be assumed that the public road through the area was always where it is now. That is, the road to Alexander’s farm may well have been a main road through the area at some time.

If the road is a R.S. § 2477 road, under Utah law, Alexander’s use and maintenance of the road is not an act of trespass. This determination should have been made before issuing a trespass notice.

The “Trespassing” Fence.

BLM also properly found that the fence was in trespass and required Alexander to remove the fence at his own expense. The fence in question enclosed approximately 15 acres of federal lands, effectively adding them to Alexander’s adjacent private lands.

Lead opinion at (draft opinion at 15-16).

^{12/} The lead opinion makes much of this response, as if this was a waiver of any rights Alexander might have to use and maintain a road that has been in existence for over 100 years. Surely, his actions before and after this “waiver” leave no doubts that he did not intend to waive those rights.

As can be seen the basis for a finding of trespass was the segregation of 14 acres from other BLM managed lands by the fence. This allegation was not based upon a claim that BLM had observed Alexander actually using or occupying the segregated land.

It is true that a 14 acre tract of BLM's land lies on Alexander's side of the fence and it can be argued that the fence excluded other public use. However, Alexander did not erect the fence, and there is no evidence that Alexander has ever used, occupied or developed the 14 acre tract.

When notified of his "trespass," Alexander, who had owned the property adjoining BLM's for about 5 years, noted that "[t]his existing fence and gate has, as you know, been in existence there for probably at least 50 years, or possibly more, and naturally it came as a surprise to me that this was way off the proper property line." (Letter dated May 7, 1993, from Alexander to BLM at 1.)

The fence in question runs east-west along Alexander's property line and then cuts diagonally to the southwest enclosing a triangular tract of land bounded on the north and west by Alexander's land, on the southeast by the fence. An irrigation ditch runs somewhat parallel to the fence and it is near Utah State road 24. The "isolated" land was deemed suitable for grazing, but there is no evidence that any of Alexander's animals were ever on the 14 acre tract. ^{13/} I disagree with BLM's conclusion that Alexander had committed trespass because a fence erected on BLM land by some unknown party segregated one portion of BLM managed land from another. There is no evidence of "[a]ny use, occupancy, or development of the public lands that requires a right-of-way, temporary use permit," as is required by 43 CFR 2801.3(a). Alexander did not need a right-of-way or use permit to not graze cattle on the tract. Alexander did not need a right-of-way or use permit to not raise crops on the tract. There is nothing in the file suggesting any other use of the tract. BLM could have removed the fence at any time, and Alexander would not have been damaged by BLM's action. ^{14/}

^{13/} BLM later stated that "[t]he only loss to the government appears to be the loss of grazing revenue which does not apply in this case because the only operator is Mr. Alexander, who did not require the land for grazing." (BLM Staff Report dated June 3, 1994 at 2.) (See also, footnote 2, above.)

^{14/} It would have been possible to resolve this "trespass" with a pair of wire cutters. The only "losses" to BLM was the loss of grazing rights and public use. By cutting the fence in one or more places both would have been restored.

It is clear that Alexander was lead to believe that he must erect a fence along his property line and take the existing fence down. However, in an undated memorandum, memorializing a May 27, 1994, telephone conversation with Alexander, the BLM author notes that

Mr. Alexander stated that he really had no reason to construct an new fence on the property boundary, other than to comply with BLM requirement to do so. I informed Mr. Alexander it was up to him whether he reconstructed the fence, but that if he did not, he may not be able to control livestock, grazing on adjacent public land, from entering his private land.

I told Mr. Alexander when he removed the fence and eliminated the enclosure of public land he should notify BLM and an inspection would be made. If this inspection revealed that all trespass had been eliminated from public land, his right-of-way grant for the access road to his property could then be issued and granted.

(Undated BLM memorandum at 1-2.)

How can it be said that Alexander benefitted from the fence? The need for Alexander to obtain right-of-way, temporary use permit, as is required by 43 CFR 2801.3(a) never arose. I see no basis for a finding that Alexander is in trespass merely because someone had erected a fence on BLM land 50 years before he acquired the adjacent private land. BLM had every legal right to remove the fence that isolated a small tract of its land, and if the isolation of this tract was a concern, it should have done so. The demand that Alexander remove a fence erected by another, as a condition precedent to the issuance of rights-of-way to Garkaine was excessive, and by making this demand, BLM overreached the scope of the regulation at 43 CFR 2801.3(e). 15/

15/ It is necessary to pay careful attention to the timing and phrasing of the assertions and statements in the casefile. For example, the lead opinion relies upon a statement Alexander made months after being charged with trespass as proof that he was in trespass when BLM's trespass decision was issued. Alexander stated that he had cattle "in the area." Assuming this statement is accurate, it does not establish where the cattle were or even what side of the fence the cattle were on. A BLM report also stated that the only cattle in the area belonged to Alexander, and that he did not need the "trespass area" for grazing. It is just as likely that the cattle were to the south of the fence as

Why it is important to determine who built the fence?

There are two reasons for building a fence. One might build a fence to keep something in, for example, a fence to keep a dog in one's yard. One could also build a fence to keep something out, such as a fence around a back yard swimming pool. To state the obvious, if I build a fence to keep my dog in my yard, it will also keep your dog out.

If I built a fence two feet inside my property line, it would keep my dog in my yard, but a portion of my yard would be on your side of the fence. The mere fact that the fence I have erected places a portion of my yard on your side of your fence should not make you a trespasser, especially if there is no evidence that you have ever used that portion of my yard which is on your side of the fence.

Similarly, if I have built a fence two feet inside my yard, leaving a portion of my yard on your side of the fence I would not have created a legal right to tell you to take down my fence and erect a new one on the property line at your expense, merely because a portion of my yard is on your side of the fence.

There is an old adage that good fences make good neighbors. If I see a hole in your fence and repair it so that your dog does not get out of your yard and damage my crops, does my mending your fence make the fence mine? Not in my neighborhood.

If the person who sold me my lot had built a fence two feet inside your property line, it would have been erected in trespass. I do not argue that fact. When you discover that the fence is on your ground, you would have the right to remove it, and I would have no recourse. Whatever a trespasser attaches to the land passes to the owner of the land. Heiselt Construction Co. v. Morrison-Knudsen Co., 176 F.2d 207,209 (C.A.Utah, 1949).

If my predecessor-in-interest built a fence in your yard, when I purchase the adjoining lot and become your neighbor the deed conveying my lot to me would not convey the fence sitting on your yard to me as an appurtenance to my lot, even though my predecessor-in-interest had erected it. Nor does the sale to me

it is that they were to the north. If one does not make the unsupported assumption that the cattle were to the north of the fence the "use of the fence" the majority finds so important would not be in trespass, as the fence would then be used to keep the cattle on BLM property and off the farm. See Footnote 3 in the lead opinion.

automatically make me a trespasser. If I were to use your land on my side of the fence, an action might lie, but it must be based on my actual use occupancy or development of your land on my side of the fence, not the mere existence of a fence.

Maps and internal memorandum raise additional questions regarding who erected the fence. BLM speculated that the fence may have been erected by the Utah Department of Transportation and extended by someone other than Alexander. (See BLM Staff Report dated June 3, 1994 at 1.) The same report speculates that "the trespass was actually created by a previous owner and Mr. Alexander appears to be an innocent party." (Id. at 2.) Torrey canal, an irrigation ditch, runs generally parallel to the fence in the area of the "trespass," raising a question regarding whether the fence may have been built to keep livestock out of the canal. (See map attached to Plan Performance/NEPA Compliance Record, dated August 23, 1993.)

In a November 9, 1993, letter the Assistant Area Manager warned Alexander that he must resolve his pending trespass, and that to do so Alexander must "secure a survey of the property line and have the fence and gate moved in accordance with the survey." Alexander was warned that

To date, we have not heard from you regarding the requirement to remove the fence and place it on the property boundary. In order to avoid assessment of trespass charges, we urge you to secure a proper survey, or at least remove the fence from public lands.

Within 30 days of receipt of this letter, we require that the fence be removed from the public land. Upon satisfactory inspection of the trespass site, the right-of-way for the access road will be offered to you. If you chose not to remove the fence, formal trespass charges must be assessed and payment demanded for all costs including unauthorized use, occupancy, and administrative costs.

(November 9, 1993, BLM letter to Alexander.)

The Gate In the Fence.

The lead opinion states that "[t]he presence of the gate and access road is consistent with the fact that the fence was being used to delineate the boundary of Alexander's property." (Lead opinion at 157 IBLA 10.)

I find this basis for “trespass” almost amusing. The road has been in existence for 100 years. The fence has been in existence for 50 years. It does not take much of a reach to conclude that the road was there before the fence. A gate is not a fence. It is a means of making a temporary hole in a fence. Thus, no matter who built the fence, it was necessary to construct the gate at the point where the fence crossed the road. Further, it is customary to have the person wanting access through a fence maintain the gate, even when that person does not own the fence. There is no basis for a finding that a person owns a fence because he maintains a gate affording access to land beyond the gate, or that by maintaining the gate a person is assumed to be announcing to the world that he owns the fence and all of the land behind it. ^{16/}

The undisputed facts are that a fence was erected on Federal land some 50 years before trespass notice was sent to Alexander, the adjoining landowner. This fence was erected by a party unknown to either Alexander or the present BLM management. This fence crossed a road to Alexander’s farm, and the road had been in existence for about 50 years before the fence was erected.

Using the lead opinion logic, if a state or county erected a fence along a highway right-of-way, with a gate across the road running from the highway to my property, the fact that I repair the gate in the fence demonstrates that I own the fence and that I believe it to be along my property line.

Alexander was not required to remove or build a fence.

The demand that Alexander remove a fence erected by another and build a fence along his property line as condition precedent to issuance of a right-of-way was excessive, and by making this demand, BLM overreached the scope of the regulation at 43 CFR 2801.3(e). BLM had the right to remove the fence that isolated a small tract of the land it manages if it desired to remove it. It should have done so.

On May 11, 1993, BLM received Alexander's response to the April 13, 1993, telephone conversation. Alexander stated that "[i]n accordance with your instructions and request, we will proceed within the next several weeks to secure a survey of the property line and will move our gate and fence in accordance with the proper survey."

^{16/} If a BLM allotment fence encloses a tract of private land does the fence (and/or a gate in it) make the owner of the inholding a trespasser? The majority argue that a fence is assumed to be a delineation of property boundaries.

From the subsequent correspondence, it is obvious that Alexander had difficulty finding someone to survey his boundary line. On September 24, 1993, he was directed to contact BLM when the survey was completed and the fence was moved to the appropriate survey line. On November 9, 1993, BLM sent a certified letter to Alexander. After referring to its September 24 letter, the Assistant Area Manager warned Alexander that he must resolve his pending trespass, and that to do so Alexander must "secure a survey of the property line and have the fence and gate moved in accordance with the survey." Alexander was warned that

To date, we have not heard from you regarding the requirement to remove the fence and place it on the property boundary. In order to avoid assessment of trespass charges, we urge you to secure a proper survey, or at least remove the fence from public lands.

Within 30 days of receipt of this letter, we require that the fence be removed from the public land. Upon satisfactory inspection of the trespass site, the right-of-way for the access road will be offered to you. If you chose not to remove the fence, formal trespass charges must be assessed and payment demanded for all costs including unauthorized use, occupancy, and administrative costs.

(November 9, 1993, BLM letter to Alexander.)

In a November 16, 1993, response, Alexander stated that he had not been able to secure a survey of the boundary and move the fence to the boundary line, and asked for an extension to the spring to have the survey run and fence moved. By letter dated December 20, 1993, BLM granted an extension to May 31, 1994, noting that he had until that date to complete the survey and realign the fence, and the right-of-way would be offered upon closure of the trespass.

On May 16, 1994, BLM wrote Alexander a warning letter advising him that it had granted an extension to May 31, but when it inspected the site on May 12, it was found that the project had not been completed. Alexander was advised that the right-of-way would be sent to him upon completion of the survey and realignment of the fence.

After having made these demands for over a year, in an undated memorandum, memorializing a May 27, 1994, telephone conversation with Alexander, the BLM author notes that

Mr. Alexander stated that he really had no reason to construct a new fence on the property boundary, other than to comply with BLM requirement to do so. I informed Mr. Alexander it was up to him whether he reconstructed the fence, but that if he did not, he may not be able to control livestock, grazing on adjacent public land, from entering his private land.

I told Mr. Alexander when he removed the fence and eliminated the enclosure of public land he should notify BLM and an inspection would be made. If this inspection revealed that all trespass had been eliminated from public land, his right-of-way grant for the access road to his property could then be issued and granted.

(Undated BLM memorandum at 1-2.)

The removal of the fence was a range improvement made at the direction of BLM, and BLM is authorized to reimburse Alexander for the expenses he incurred making this rangeland improvement pursuant to 43 CFR 4120.3-8(b). I find reimbursement is clearly warranted in this case, either as reimbursement of excess payment or as payment for range improvement.

Appeal of Issuance of the Right-of-Way.

On June 28, 1994, BLM sent right-of-way grant No UTU-68993 to Alexander at his San Diego, California address. In the body of the cover letter the Area Manager included a paragraph stating that

[t]his issuance of the right-of-way grant constitutes a final decision by the Bureau of Land Management in this matter. You may appeal this decision to the Interior Board of Land Appeals. Enclosed is BLM form 1842-1 which explains your appeal rights.

(June 28, 1994, BLM cover letter at 1.)

There is no green card or other document in the file indicating when Dr. Alexander received this document. His appeal was dated July 19, 1994, and stamped as being received by BLM on July 28, 1994. In Southern California Sunbelt Developers, 154 IBLA 115 (2001), we noted that the running of the 30-day appeal period begins the day following the date of receipt, and the notice of appeal is due no later than 30 days from the day following the date of receipt. Assuming the ridiculous, that is, that the BLM's June 28 decision, mailed in southern Utah, was received in

San Diego, California on the same day, the second appeal was also filed in a timely manner.

The initial trespass allegation came about when BLM found a 50 year old fence while examining a right-of-way route for a power line. After getting Alexander to agree to remove the fence BLM upped the ante by demanding that he obtain a road right-of-way for access to his farm over a 100 year old road. To make sure he did, Alexander was told that if he did not file an application for a road right-of-way the power company would not be allowed to deliver power to his property, and that if he did not withdraw his appeal, the delivery of power would be delayed by his appeal. The lead opinion finds nothing wrong with this action. They state that Alexander did not prove the existence of a RS § 2477 right of way, ignoring BLM's acknowledgment that the road to his farm, which had existed for over 100 years, was his only means of access to his farm, and that it was a road capable of serving an operating farm. This ignores the obvious fact that, if one admits all elements of an allegation, the allegation is proven.

The right-of-way should be set aside and the case file should be returned to BLM for further processing, taking into consideration the existence of a R.S. 2477 right of way or prescriptive easement. Further, Alexander should be reimbursed for the reasonable costs of removing the fence.

Being unable to agree with the lead opinion's assessment of the facts and the law, I respectfully dissent.

R.W. Mullen
Administrative Judge